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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1717

WRITERS GUILD OF AMERICA, WEST, INC., *et al.*,

Petitioners,

v.

AMERICAN BROADCASTING COMPANIES, INC., *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners[1] respectfully pray that this Court grant this Petition for a writ of certiorari to review the

[1] Petitioners were plaintiffs below. They are: Writers Guild of America, West, Inc., Writers Guild of America, East, Inc., Directors Guild of America, Inc., Screen Actors Guild, Inc., Concept Plus II Productions, Four D Productions, Danny Arnold, Allan Burns, Samuel Denoff, Larry Gelbart, Susan Harris, Norman Lear, William Persky, Paul Witt, and Edwin Weinberger ("Writers Guild Plaintiffs") and Tandem Productions, Inc. ("Tandem"). Respondents were defendants below. The Private Defendants are: National Association of Broadcasters ("NAB"), American Broadcasting Companies, Inc. ("ABC"), CBS Inc. ("CBS"), and National Broadcasting Company, Inc. ("NBC"). The Government Defendants are the Federal Communications Commission ("FCC"), its former Chairman Richard J. Wiley, Commissioners Abbott Washburn, Robert E. Lee, and James H. Quello, and former Commissioners Benjamin C. Hookes, Charlotte T. Reid and Glen O. Robinson.

judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on November 14, 1979.[2]

Opinions

The opinion of the United States Court of Appeals for the Ninth Circuit, reported at 609 F.2d 355 (1979), appears in the Appendix at A-4. The opinion of the United States District Court for the Central District of California, reported at 423 F.Supp. 1064 (1976), appears in the Appendix at A-40.[3]

Jurisdiction

Petitioners invoke this Court's jurisdiction under 28 U.S.C. § 1254(1). The judgment and opinion of the United States Court of Appeals for the Ninth Circuit was entered on November 14, 1979. On January 30, 1980, the United States Court of Appeals for the Ninth Circuit denied Petitioners' motion for rehearing and suggestion of appropriateness of rehearing in banc. The within Petition is filed within 90 days of that denial.

Questions Presented

1. Does the primary jurisdiction doctrine require the district court to refer to the FCC claims that the FCC acted beyond constitutional, jurisdictional, and procedural bounds, when the central issues are within the conventional competence of courts, do not threaten to interfere with a regulatory scheme, and when the agency's views on those issues are known?

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[2] The judgments for which review is sought were entered in cases Nos. 77-1058, 77-1059, 77-1060, 77-1061, 77-1103, 77-1602, 77-1756, 77-1897, and 77-2357. The full captions for those cases appear in the Appendix at A-4-5.

[3] Hereinafter citations to the opinion below will be given as "609 F.2d at ...., A-....;" citations to the district court's opinion will be given as "423 F.Supp. at ...., A-....."

2. Does the primary jurisdiction doctrine require the district court to refer to the FCC claims that the FCC imposed a prior restraint on broadcast speech, when that reference will delay and impede judicial review of the alleged restraint?

3. Does the primary jurisdiction doctrine require the district court to refer to the FCC claims that the FCC violated the Administrative Procedure Act ("APA") by engaging in policymaking without giving proper notice and opportunity for comment?

Constitutional Provisions Involved

The First Amendment to the United States Constitution provides in pertinent part that, "Congress shall make no law . . . abridging the freedom of speech, or of the press. . . ."

Statutes Involved

Section 4 of the APA, 5 U.S.C. § 553, which is set out in full in the Appendix at A-1, provides for procedures to be used in agency rulemaking.

Section 10(a) of the APA, 5 U.S.C. § 702, which is set out in full in the Appendix at A-3, provides in pertinent part that, "A person suffering legal wrong because of agency action . . . is entitled to judicial review thereof."

Statement of the Case

These cases were brought by four guilds of creative artists, three production companies, and nine writers, producers, and directors of television programs to contest the legality of the "Family Viewing Policy." That policy was adopted by the National Association of Broadcasters ("NAB") in April 1975 following intensive pressure by the FCC. The policy provided that

"Entertainment programming inappropriate for viewing by a general family audience" should not be shown during the first hour of "prime time" and during the immediately preceding hour. The NAB's Television Code Review Board, with the active assistance of the television networks, enforced the policy. The FCC monitored the enforcement.

Petitioners brought two actions in the district court. The principal focus of both actions was on the role of the FCC. Petitioners contended that the FCC had coerced the networks, and had conspired with them and the NAB, to adopt the Family Viewing Policy. The first action, brought by the Writer's Guild Plaintiffs, alleged that: (1) the FCC, the NAB and the networks had violated the First Amendment by imposing an illegally vague restraint on broadcast speech; (2) the FCC had violated the APA, 5 U.S.C. §§ 551-59, 701-06, by engaging in rulemaking without proper notice and comment; (3) the FCC had violated Section 326 of the Communications Act of 1934, 47 U.S.C. § 326; and (4) the networks had violated the Sherman Act. The Writer's Guild Plaintiffs sought declaratory and injunctive relief. The second action, brought by Tandem, alleged the same violations, except that it did not allege an APA claim; Tandem also sought damages, for censorship of its program "All In The Family," in addition to declaratory and injunctive relief.

The Complaints were filed in November 1975. The district court set an expedited discovery schedule and an early date for the court trial of the First Amendment issues.[4] After a lengthy trial in April and May 1976, the district court found that Richard E. Wiley, then Chairman of the FCC, acting on behalf of the FCC, had

[4] The issues were bifurcated for trial; trial on the antitrust issues was stayed.

"launched a campaign primarily designed to alter the content of entertainment programming in the early evening hours." 423 F.Supp. at 1094, A-90. Chairman Wiley's actions were found to be

> "the direct cause of the implementation of the family viewing policy: were it not for the pressure he exerted, it would not have been adopted by any of the networks nor by the NAB. The threat of [FCC] regulatory action was not only a substantial factor leading to [the Family Viewing Policy's] adoption but a crucial, necessary, and indispensable cause." 423 F.Supp. at 1094, A-90.

The district court also found that the FCC had conspired with the Private Defendants to censor non-network television licensees:

> "[T]he Commission itself has participated in an unprecedented joint venture, a transaction in which it has joined with the most powerful forces in broadcasting to permit a national board to dictate what may be heard, to implement a policy developed and conceived by government." 423 F.Supp. at 1145, A-204.

The district court made extensive factual findings in support of those conclusions. Those findings were not disputed by the Court of Appeals.[5]

The FCC's pressure on the networks and the NAB found expression not only in the promulgation of the Family Viewing Policy, but also in the policy's enforcement. The district court found that, subsequent to April 1975, the NAB Television Code Review Board functioned as an enforcement mechanism for the Family Viewing Policy. 423 F.Supp. at 1123, A-157. The

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[5] The Court of Appeals appended summaries of the factual findings and holdings of the district court to its opinion. 609 F.2d at 366-72, A-26-39.

district court found that the effect of this enforcement mechanism was "significant self-censorship" by television producers and the transformation of network editors from independent decisionmakers into "conduits of FCC and NAB policy." 423 F.Supp. at 1126, A-163.

The FCC had not hesitated to take credit for its role in promulgating the Family Viewing Policy. On February 19, 1975, the FCC submitted its *Report on the Broadcast of Violent, Indecent, and Obscene Material*[6] to Congress, which stated:

> "Recent events make it appear that *our* initiative has been successful and that the broadcast industry intends to regulate itself *in order to obviate the need or demand for governmental action in this area.* (Emphasis added in part). 423 F.Supp. at 1117-18. A-142-44.

When these suits were filed, however, the FCC took the position that the NAB adopted the Family Viewing Policy without FCC participation. Throughout the trial, the FCC denied that Chairman Wiley and the FCC staff had pressured the Private Defendants into adopting the Family Viewing Policy. 423 F.Supp. at 1092, A-86. Chairman Wiley testified that he had only acted personally, not on behalf of the FCC. 423 F.Supp. at 1092, A-87. The district court found a serious question as to the FCC's credibility on this issue. 423 F.Supp. at 1122, A-154. It found that:

> "Acting through Chairman Wiley, [the FCC] declared that broadcasters had to reduce substantially the broadcasting of violence and adult material in the early evening hours. If such action were not forthcoming, regulatory actions up to and including the relicensing process were threatened. Understandably concerned about the existence of its

[6] 51 F.C.C.2d 418 (1975).

> power to do anything, the Commission resorted to informal coercion. Believing that it could not develop a record sufficient to support regulatory action, [the FCC] threatened such action anyway. This lawless conduct cannot be tolerated if broadcasters are to enjoy meaningful First Amendment freedoms." 423 F.Supp. at 1149, A-213.

The district court held that the Family Viewing Policy as adopted violated both the First Amendment as an illegally vague restraint on speech and the APA as a circumvention of required procedures.[7] The FCC was found liable with respect to its direct acts and the Private Defendants' acts which it had caused and conspired to accomplish. 423 F.Supp. at 1151, A-217. The Private Defendants were found liable under two distinct theories of government action: voluntarily abandoning their independence in the face of FCC pressure, 423 F.Supp at 1140-43, A-194-200, and conspiring with the government to restrain non-network licensees. 423 F.Supp. at 1143-46, A-200-07. The district court granted the Writers Guild Plaintiffs and Tandem declaratory relief against the FCC and the Private Defendants and held that Tandem could recover damages.[8]

All parties except Tandem appealed from the district court's judgment.[9] NBC did not appeal from, and expressly agreed with, the district court's First Amendment holdings; it only appealed the issue of

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[7] The district court held that it lacked jurisdiction over the Communications Act claim. 423 F. Supp. at 1084, A-68-69.

[8] The district court certified its decision in the *Writers Guild* case as a final order pursuant to Federal Rule of Civil Procedure 54(b) and certified its judgment as to liability in the *Tandem* case as an interlocutory order pursuant to 28 U.S.C. § 1292(b).

[9] The Writers Guild Plaintiffs appealed from the district court's holding that it lacked discretion to award them attorneys' fees.

damage liability. NBC Reply Brief at 2, *Writers Guild of America, West, Inc. v. ABC, supra.* ABC, CBS and the NAB, in a joint brief, argued, *inter alia,* that the district court should have referred the entire action to the FCC under the primary jurisdiction doctrine.

The district court had previously rejected the primary jurisdiction argument on three distinct grounds:

(1) the legal and factual issues involved in challenging the private, secretive conduct of the FCC, the NAB and networks were "all topics peculiarly unsuited to impartial FCC scrutiny . . . ," 423 F.Supp. at 1090, A-82;

(2) the legal questions, and in particular the key issue of "state action," as well as the question of remedies, involved no special FCC expertise, 423 F.Supp. at 1090, A-82; and

(3) the FCC's position on the issues was already known and had been presented by the FCC during the trial. 423 F.Supp. at 1090-91, A-82-83.

The Ninth Circuit rejected the district court's reasoning and ruled tnat the doctrine of primary jurisdiction compelled the district court to refer the matter to the FCC for review. It vacated the judgment of the district court with instructions to hold in abeyance the claims against the Private Defendants "pending resolution and judicial review of the administrative proceedings before the FCC." 609 F.2d at 358, A-9.

In response to the district court's conclusions regarding primary jurisdiction, the Ninth Circuit:

(1) Held that the FCC's position on the legality of the Family Viewing Policy was clear only in the context of the instant lawsuit, 609 F.2d at 364, A-20;

(2) Rejected the district court's finding that the FCC possessed "no special expertise in formulating 'a theory of governmental action under the First Amendment or [fashioning] appropriate remedies,'" 609 F.2d at 363, A-20; and

(3) Held that it was not known "what the position of the FCC would have been, or in the future will be, when confronted by the plaintiffs' claims in a proper administrative proceeding," 609 F.2d at 364, A-20, and rejected the district court's finding that the FCC's views could be presented in this case as well as they could be in a formal administrative proceeding. 609 F.2d at 363, A-20.

REASONS FOR GRANTING THE WRIT

Summary of Argument

The decision below permits a powerful federal regulatory agency to turn entities under its control into pawns to make and enforce its policies, to deny that it has acted, and then to review its own alleged misdeeds and policies on the terms and timetable it chooses. The Ninth Circuit allowed that result by defining and manipulating the primary jurisdiction doctrine in conflict with this Court's prior holdings. The Ninth Circuit's novel and aberrant use of primary jurisdiction raises important issues of proper court-agency relations; it is inconsistent with the careful efforts of this Court to delineate the allocation of decisional responsibility between courts and agencies. Furthermore, the Ninth Circuit, in these cases, employs the primary jurisdiction doctrine in actions challenging pervasive censorship and studied evasion of the APA, notwithstanding the hallmark cases of this Court stressing that First Amendment and APA claims are entitled to prompt judicial review.

The reference of these cases to the FCC directly conflicts with this Court's holdings which establish that courts may refer actions to agencies to gain agency expertise on factual issues and to avoid inconsistent results in a regulated industry. Primary jurisdiction has no role to play when the agency, which would be the judge, is itself on trial for illegal and unconstitutional action. Nor is the primary jurisdiction doctrine applicable when the defendant agency denies having any policy pertaining to the relevent issues, so that the claims presented do not interfere with regulatory policy.

Second, the decision below conflicts with a long line of cases in which this Court has held that alleged First Amendment violations require prompt judicial, not administrative, scrutiny. The holding of the Ninth Circuit not only delays that constitutional review, but also remits Petitioners to the very agency that erected the restraint.

Third, this Court, as well as circuit courts, has consistently held that alleged APA violations are subject to immediate judicial review. The Ninth Circuit has held to the contrary that claims of APA violations should be referred by the district court to the agency.

In short, this Court should grant this Petition because the Ninth Circuit has applied the primary jurisdiction doctrine in an inappropriate manner with disastrous results for both constitutional and administrative law.

1. The Ninth Circuit's Decision Conflicts With Prior Decisions Of The Court, Misapplies The Primary Jurisdiction Doctrine, And Effectively Insulates Extra-Jurisdictional FCC Actions From Judicial Review.

Until the Ninth Circuit's decision, neither this Court, nor any other federal court, had applied the primary jurisdiction doctrine to require an agency to

revisit its own actions and to determine the legality of its own prior activities. It would be unthinkable to ask a law enforcement agency or an administrative agency to review its compliance with the Fourth Amendment. *See Ybarra v. Illinois,* 48 U.S.L.W. 4023 (Sup. Ct. Nov. 28, 1979); *Marshall v. Barlow's, Inc.,* 436 U.S. 307 (1978). Likewise, in the First Amendment area, where a state bar association disciplined its members for advertising, in violation of its rules, those members could go into court for a declaration of unconstitutionality, even though the bar association had not decided whether the rule violated the First Amendment. *See Bates v. State Bar of Arizona,* 433 U.S. 350, 356 (1977). Nor do courts ask censors to decide whether their actions violate the First Amendment. *See Freedman v. Maryland,* 380 U.S. 51 (1965).[10]

Had this case been brought against the networks alone, invocation of the doctrine might have been proper. But this is not such a case. Here, Petitioners alleged that the agency itself had committed constitutional and statutory violations.

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[10] This Court has used the primary jurisdiction doctrine where a party other than the agency was charged with wrongdoing. In such cases, the agency could evaluate the propriety of that party's conduct in light of its regulatory scheme. *See, e.g., Ricci v. Chicago Mercantile Exchange,* 409 U.S. 289, 290-91 (1973) (allegations that mercantile exchange violated antitrust and commodities exchange laws referred to Commodity Exchange Commission); *Pan American World Airways, Inc. v. United States,* 371 U.S. 296 (1963) (charges that airline and shipping companies violated the Sherman Act referred to Civil Aeronautics Board).

Where the agency itself is the alleged wrongdoer, referral plainly is improper. In *Gemini Enterprises, Inc. v. WFMY Television Corp.,* 470 F.Supp. 559 (M.D.N.C. 1979), a district court recently so recognized. The plaintiffs claimed that the FCC had engaged in "a covert . . . policy to keep astrological programming and advertising off the air." *Id.* at 571. The court held that it would be inappropriate "to invoke the doctrine of primary jurisdiction to commit consideration of this case to an agency which was allegedly the instigator of the challenged conspiracy." *Id.*

The primary jurisdiction doctrine allocates fact finding between courts and agencies. This Court has tailored primary jurisdiction carefully to meet specific circumstances not present in this case. That doctrine is available only when a court and an administrative agency both have jurisdiction over an action, and when reference of the action to the agency may yield the agency's views on factual issues which are within the agency's field of expertise. *Nader v. Allegheny Airlines, Inc.*, 426 U.S. 290, 304 (1976); *United States v. Radio Corp. of America*, 358 U.S. 334, 346-52 (1959). In addition, the doctrine has as its historic underpinning the prevention of inconsistencies between the decisions of courts and those of agencies in areas where regulatory uniformity is critical. *United States v. Western Pacific R.R. Co.*, 352 U.S. 59, 63-64 (1956).

This Court's decisions have clearly delineated the boundaries of the primary jurisdiction doctrine. First, where "[t]he standards to be applied . . . are within the conventional competence of the courts, and the judgment of a technically expert body is not likely to be helpful in the application of these standards to the facts" of a case, initial reference to the agency is not appropriate. *Nader v. Allegheny Airlines, Inc., supra*, 426 U.S. at 305-06. The principal issues before the district court—the state action doctrine, First Amendment and APA violations, and damage issues—are just those kinds of questions. Courts, not regulatory agencies, have historically addressed them.[11]

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[11] *E.g., Burton v. Wilmington Parking Authority*, 365 U.S. 751 (1961) (state action); cases cited *infra* at 18, 25-26 (First Amendment and APA); *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388 (1971) (damages). *See also Califano v. Sanders*, 430 U.S. 99, 109 (1977) (constitutional issues must be decided by courts; *dictum*).

Second, this Court has permitted actions to proceed in trial courts, as opposed to regulatory agencies, when judicial resolution of the material issues presented no problem of interference with a regulatory scheme. *United States v. Radio Corp. of America, supra.* There is no such problem in these cases. The FCC has no statutory warrant to regulate "programming inappropriate for viewing by a general family audience."[12] To the contrary, Section 326 of the Communications Act, 47 U.S.C. § 326, specifically forbids the regulation of program content.[13] Indeed, throughout this litigation Chairman Wiley maintained that the FCC had not acted and could not have acted to promulgate or enforce the Family Viewing Policy, and that the Family Viewing Policy is simply an agreement among private entities. In such a case, there is no regulatory scheme to protect.

Finally, the Court has not referred plaintiffs to an agency when reference would be pointless.[14] The

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[12] The FCC has never claimed that the proscribed speech was obscene or indecent.

[13] Section 326 provides that:

"Nothing in this chapter shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication."

[14] Reference is also pointless, and uneconomical, for the judicial system in First Amendment cases. Because the standards for review of administrative determinations of First Amendment questions are so high, no economies would result from initial referral to the FCC. A reviewing court must subject the FCC's rulings that touch upon First Amendment concerns to a "searching review." *National Citizens Comm. for Broadcasting v. FCC,* 555 F.2d 938, 948 & n.22 (D.C. Cir. 1977), *rev'd on other grounds,* 436 U.S. 775 (1978); *accord, Porter v. Califano,* 592 F.2d 770, 780 n.15 (5th Cir. 1979) ("[i]ndependent judicial judgment is especially appropriate in the First Amendment area"). Thus, initial referral to the agency would result in a needless drain on scarce dispute-resolution resources.

Court has recognized the futility of invoking the primary jurisdiction doctrine when the agency's action was completed at the time the case was filed, *United States v. Philadelphia Nat'l Bank,* 374 U.S. 321, 353 (1963); where the agency has already addressed the issue,[15] *United States v. Western Pacific R.R. Co., supra,* 352 U.S. at 69; or where the agency had declined to participate. *Rosado v. Wyman,* 397 U.S. 397, 406-07 (1970).

By the time suit was filed in this case, the FCC had completed its formal action on the Family Viewing Policy: its February 1975 Report to Congress specifically applauded the Family Viewing Policy as private, "self-regulation". 423 F.Supp. at 1117, A-142. Thus, the FCC had already addressed the central issue of whether its own conduct had caused the Family Viewing Policy and had thereby tainted the Family Viewing Policy with government action. Reference to the FCC would have been a futile act, delaying judicial review. As the district court stated:

> "Essentially the [FCC's] argument boils down to this: The plaintiffs, who allege that the Commission and its staff sought through extra-legal channels to impose an unconstitutional scheme of censorship in direct defiance of established procedures, statutory commands, and constitutional limitations, must continue to suffer irreparable injury while going through the ritualistic exercise of asking the Commission to admit guilt which it strenuously denies.

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[15] *See Board of Education v. Harris,* No. 1079, slip op'n at 5415 (2d Cir. Nov. 19, 1979) ("where resort to the agency would plainly be unavailing in light of its manifest opposition or because it had already evinced its 'special competence' in a manner hostile to petitioner, courts need not bow to the primary jurisdiction of the administrative body."); *Natural Resources Defense Council, Inc., v. Train,* 510 F.2d 692, 703 (D.C. Cir. 1975); *Shew v. Southland Corp.,* 370 F.2d 376, 379-80 (5th Cir. 1966).

> "Ironically, the Commission's papers on file with this court (the very papers which argue for exhaustion of remedies) demonstrate that it has predetermined the issues adversely to the plaintiffs. It forcefully argues in its papers that there has been no agency action of any kind and no violation of section 326 or of the First Amendment by the Commission or any of its members." 423 F.Supp. at 1081, A-61.

The Ninth Circuit's misunderstanding of the doctrine is apparent in the questions it referred to the FCC. The Ninth Circuit stated that "the primary jurisdiction doctrine provides a needed opportunity to obtain an explicit and well articulated determination by the FCC of whether its actions under Chairman Wiley properly walked the [regulatory] 'tightrope.'" 609 F.2d at 363, A-19. However, that very general inquiry overlooks the fact that Chairman Wiley had already "walked the tightrope." Petitioners sought relief from ongoing censorship, not a rule for future FCC behavior. Additionally, the Ninth Circuit stated that the FCC "could provide enormous assistance to the judiciary" on the issue of "whether a family viewing hour imposed by the FCC would contravene the First Amendment." 609 F.2d at 364, A-21. However, that issue did not have to be decided. All defendants—the FCC, the networks and the NAB—agreed that the FCC could not have imposed a restraint on sexually oriented or violent programs. Indeed, the district court explicitly avoided deciding that issue. 423 F.Supp. at 1149, A-213-14.

The primary jurisdiction doctrine can play a role in proper court-agency relations only if its limitations are recognized. If it is used imprecisely, as it was here, it simply delays required judicial review. Here, its use would result in sending a policy to the FCC for review

of indefinite scope and duration, while the policy in question remains in force, insulated from judicial oversight.

2. The Ninth Circuit's Decision Conflicts With This Court's Decisions Requiring That Restraints On Speech Be Given Prompt Judicial Review.

The decision of the Ninth Circuit to delay judicial review is particularly egregious in light of the First Amendment restraint on speech claimed and found to exist in these cases. Government censorship, in the form of the Family Viewing Policy, restrained the creation and airing of a wide variety of material to be broadcast into every home in the United States every night. 423 F.Supp. at 1126, A-164:

> "Significant self-censorship was evident. Characters were not developed, themes were not explored, language was deleted—all in response to network adherence to family viewing principles. . . . It transformed network editors from independent decisionmakers into conduits of FCC and NAB policy. Instead of deciding what should and should not be broadcast, they decided what material would evoke criticism from other networks and NAB functionaries. In fact, at one early and hysterical point one CBS executive told producers that they should limit the material in their shows to that which would avoid embarrassing the most 'uptight parent that could be imagined.'" 423 F.Supp. at 1126, A-163.

In addition, shows were typed as inappropriate for family viewing and rescheduled outside the first hour of prime time and the immediately preceding hour. The district court found that "'All In The Family' was rescheduled out of the family viewing time period

because of the family viewing policy." 423 F.Supp. at 1127, A-165. The court described the pressures which led to moving that show:

> "[CBS president Arthur] Taylor was so opposed to moving the show that he suggested that instead of moving the show, 'Our response will have to lie in the area of content change. . . .' Ultimately [Norman] Lear was contacted to see if he would agree to such changes in the show. Predictably Lear was not prepared to cooperate with such measures to mollify CBS's concerns about objections from competitors. CBS was therefore forced to move the show in order to comply with its pledge to adhere to NAB perceptions of the meaning of the family viewing policy." 423 F.Supp. at 1127 A-165.

By referring Petitioners to the FCC, the Ninth Circuit failed to heed this Court's firm directive that a restraint on speech must be promptly reviewed by a court. It thereby transformed the primary jurisdiction doctrine from a flexible decision-making aid into a stumbling block to the assertion of First Amendment freedoms. The implications of the Ninth Circuit's holding for those who would challenge a prior restraint on speech thus extend far beyond the confines of this case.

a. ***The Ninth Circuit, by referring these cases to the censoring agency, disregards this Court's requirement that restraints on speech be promptly reviewed by courts.***

This Court repeatedly had held that a challenge to a prior administrative restraint on speech must be heard by a court, not the censoring agency, and that that hearing must come promptly, not after protracted administrative proceedings.

Those requirements are essential safeguards against the "perils of prior restraint" because an administrative body "may well be less responsive than a court, an independent branch of government, to constitutionally protected interests in free expression." *Southeastern Promotions, Ltd. v. Conrad,* 420 U.S. 546, 561 (1975). *See, e.g., Vance v. Universal Amusement Co., Inc.,* 48 U.S.L.W. 4273, 4275 (Sup. Ct. March 18, 1980) (*per curiam*) ("prior restraints of indefinite duration on the exhibition of motion pictures that have not been finally adjudicated to be obscene" are invalid); *Blount v. Rizzi,* 400 U.S. 410, 421 (1971) ("The appellees here not only were not afforded 'prompt judicial review' but they 'can only get full judicial review on the question of obscenity . . . after lengthy administrative proceedings, and then only by [their] own initiative.' "); *Freedman v. Maryland, supra,* 380 U.S. at 55 ("there is no statutory provision for judicial participation in the procedure which bars a film, nor even assurance of prompt judicial review. Risk of delay is built into the . . . procedure"); *Bantam Books, Inc. v. Sullivan,* 372 U.S. 58, 70 (1963) ("We have tolerated [a prior restraint] system only where it operated under judicial superintendence and assured an almost immediate judicial determination of the validity of the restraint."); Monaghan, *First Amendment "Due Process,"* 83 Harv.L.Rev. 518, 520 (1970) ("Central to first amendment due process is the notion that a judicial, rather than an administrative, determination of the character of the speech is necessary").[16]

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[16] This Court has articulated both substantive and procedural requirements which must be satisfied by a constitutional system of prior restraint. Substantively, a prior restraint has been deemed permissible only when obscenity, speech inciting violence or overthrow of the government, and possibly military security are involved. *See Nebraska Press Ass'n v. Stuart,* 427 U.S. 539, 590-92 (1976). There is no charge of such disfavored content here. Procedurally, such systems can be acceptable only if the burdens of

(Footnote continued on next page)

The Family Viewing Policy, however, did not provide for judicial review, prompt or otherwise. The district court found that the Family Viewing Policy was instituted and operated in a procedural star chamber, where Petitioners could not even appear. 423 F.Supp. at 1072, 1149, A-41, 213. In place of a formal inquiry and rulemaking procedure, designed to secure public participation in the decision-making process, the FCC formulated and instituted its new policy of censorship by means of closed-door influence, pressure, and threats. 423 F.Supp. at 1149, 1151-53, A-213, 218-22. In place of an adjudicative proceeding in which the censoring body applied precisely articulated standards to the speech it sought to restrain, the censors here proceeded by "trial-and-error," 423 F.Supp. at 1124, A-158, to foreclose speech which was "inappropriate." This standard was "so vague that no one can adequately define it." 423 F.Supp. at 1149, A-214. The FCC provided no administrative process whatsoever by which one could appeal a determination that a program, a theme or a line of dialogue would be "inappropriate" for family viewing.[17]

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instituting proceedings and proving that the material is unprotected rest with the censor; the restraint imposed prior to review must be for a brief period, and only to preserve the status quo; and a "prompt final judicial determination must be assured." *Southeastern Promotions, Ltd. v. Conrad, supra,* 420 U.S. at 560. *Cf. FCC v. Pacifica Foundation,* 438 U.S. 726, 736-37 & n.10 (1978) (distinguishing "the *subsequent* review of program content," from a prior restraint on speech) (emphasis added). None of the substantive or procedural requirements for the imposition of a prior restraint is met here.

[17] This Court has noted that, in determining the constitutionality of a system of prior restraint, "[e]ach medium of expression . . . must be assessed for First Amendment purposes by standards suited to it, for each may present its own problems." *Southeastern Promotions, Ltd. v. Conrad, supra,* 420 U.S. at 557. Broadcasting presents its own particularly complex problems, for it is a medium to some extent subject to government regulation. *See, e.g., FCC v. Pacifica Foundation, supra,* 438 U.S. at 748.

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Rather than permitting the district court to respond to the serious constitutional issues raised by the Family Viewing Policy's restraint of speech, the Ninth Circuit's decision actually removed the censorship system from judicial superintendence. By holding that judicial review must be delayed pending "an explicit and well articulated determination" by the FCC, it allows an alleged wrongdoer to determine at its leisure and on what record its actions will be reviewed. Meanwhile, the agency's restraint on speech will be allowed to continue unabated, stifling the exercise of First Amendment rights on an ongoing basis. *See Southeastern Promotions, Ltd. v. Conrad, supra,* 420 U.S. at 562 ("During the time prior to judicial determination, the restraint altered the status quo. . . . The delay and uncertainty inevitably discouraged use of the forum.") The decision of the Ninth Circuit thus compounded the very injuries to free speech that courts are required to remedy.

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This Court has yet to review a censorship system operating as a prior restraint on the content of broadcasting. Lower courts have concluded, however, that the "central concern [of *Freedman v. Maryland*], that judicial proceedings be available for rapid removal of unwarranted prior restraints," *Home Box Office, Inc. v. FCC,* 567 F.2d 9, 50 (D.C. Cir.) (*per curiam*), *cert. denied,* 434 U.S. 829 (1977), is fully applicable in the area of broadcasting. In *Midwest Video Corp. v. FCC,* 571 F.2d 1025 (8th Cir. 1978), *aff'd on other grounds,* 440 U.S. 689 (1979), the Court of Appeals for the Eighth Circuit found that FCC rules requiring cable operators to exclude obscene and indecent material from access to their facilities failed to provide any of the "prior-restraint safeguards" mandated by this Court in *Southeastern Promotions, Ltd. v. Conrad* or *Freedman v. Maryland.* 571 F.2d at 1057. The Ninth Circuit's decision to refer this case to the FCC ignores that "central concern" and is thus in direct conflict with *Home Box Office* and *Midwest Video.*

b. ***The Ninth Circuit's decision creates intolerable obstacles to the vindication of First Amendment rights.***

The delay inherent in an administrative proceeding, particularly one as vague as that proposed by the Ninth Circuit,[18] places an unacceptable burden on the protection of First Amendment rights. As this Court repeatedly has cautioned: "if judicial review is made unduly onerous, by reason of delay or otherwise, the [censor's] determination in practice may be final." *Southeastern Promotions, Ltd. v. Conrad, supra,* 420 U.S. at 561.

As a practical matter, initial reference to the FCC for the development of a record and findings seriously diminishes the likelihood that the real facts of the agency's conduct will ever surface. This case plainly illustrates that extensive discovery is essential to expose evidence of an agency's activities. When Petitioners instituted this suit, they knew merely the skeleton of the FCC's efforts. Only with the aid of discovery were they able to learn of the private meetings and threatening telephone calls between Wiley and network presidents, the manipulative use of leaked press statements, and the threat of a revised license renewal process. A litigant forced to proceed before the FCC, however, would be limited to the minimal discovery tools available in FCC proceedings. The FCC mechanisms for discovery are especially restricted when discovery is sought against the agency itself. *See* 47 C.F.R. § 1.311(b) (2)-(4).

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[18] The opinion below makes it nearly impossible to know what kind of proceeding the FCC should hold, or what questions it should address.

Moreover, the litigant's ability to use those discovery tools would be controlled by the very agency whose conduct it hoped to expose. A record developed under the control of the FCC would have painted an entirely different picture of the FCC's conduct than that which emerged under the neutral auspices of the district court.[19] That record would then be brought before the court on review. By placing the responsibility for developing and finding facts in the very body charged with wrongdoing, the Ninth Circuit seriously impeded a plaintiff's ability ever to obtain relief.

Finally, subjecting First Amendment claims to a burdensome administrative process unlikely to produce any benefit to the litigant or the reviewing court could itself deter the raising of those claims. The FCC proceedings to which the Ninth Circuit refers this case are unlikely to yield any useful results. Despite the Ninth Circuit's speculations, an about-face confession of error by the FCC seems at best improbable. The FCC consistently has denied that any of its actions were unconstitutional or otherwise unlawful, both prior to and throughout the course of this litigation. *See* 423 F.Supp. at 1081, A-61. The Ninth Circuit's decision to refer this case to the FCC on the theory that the FCC might have taken that position under oath for "tactical" reasons, and might later recant, is profoundly disturbing. To the contrary, persons who hold positions of

[19] The limitations on factfinding within the agency and the consequent impairment of a litigant's ability to challenge agency action were dramatically revealed during the course of trial before the district court. The district judge's persistent questioning of the FCC's counsel revealed a telling omission in the factual record developed before the FCC in *Illinois Citizens Comm. for Broadcasting v. FCC*, 515 F.2d 397 (D.C. Cir. 1975), and relied upon by the United States Court of Appeals for the District of Columbia Circuit. That omission "call[ed] into serious question the credibility of the Commission in general . . . ." 423 F.Supp. at 1122, A-154.

public trust presumably would be "open and forthcoming," 609 F.2d at 364, A-21, when placed under oath in a deposition or in a court of law.

The Court of Appeals' willingness to tolerate, and indeed to create, those obstacles to relief reveals a complete misapprehension of the First Amendment issues before it. Petitioners faced an unusal dilemma. The FCC-imposed censorship system was in place and functioning, but the accused agency steadfastly denied any involvement in the system. 423 F.Supp. at 1083, A-66. In short, it is difficult to conceive of a case in which the need for judicial review was more immediate, or withholding that review pending agency proceedings more threatening to constitutional rights, than existed here.

The need for this Court to exercise its jurisdiction is compelling. The Ninth Circuit's unprecedented use of the primary jurisdiction doctrine, if allowed to stand, poses a serious and constitutionally intolerable threat to the preservation of First Amendment freedoms.

3. Whether The FCC Complied With The Procedural Dictates Of The APA Is A Question For Courts, Not For Administrative Agencies, To Decide.

Even though the district court found that the FCC had "total[ly] disregard[ed] the procedural protections" of the APA, and had "dictated and negotiated [the Family Viewing Policy] wholly outside the procedures of the Act," 423 F.Supp. at 1151, A-214, the Ninth Circuit has sent the case back to that agency for review of the APA issue. The reference is both illogical and contrary to the APA itself.

Section 10(a) of the APA, 5 U.S.C. § 702, provides that a "person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." The Ninth Circuit refused to permit judicial review when the "legal wrong" was violation of the APA itself. The Ninth Circuit's conclusion that FCC review of an APA violation was necessary conflicts with decisions of this Court and with the express and implied holdings of other circuit and district courts.

Through a series of actions, taken over the course of many months, the FCC engaged in what amounted to rulemaking. Those actions included speeches by Chairman Wiley, meetings among FCC personnel and broadcast industry personnel, various telephone calls and leaked news stories, and the adoption of the FCC's February 1975 Report which approved the Family Viewing Policy before it was enacted by the NAB. The district court held that those FCC actions constituted agency policymaking, 423 F.Supp. at 1151-53, A-218-22, and as such they were subject to the notice and comment requirements of Section 4 of the APA, 5 U.S.C. § 553.[20]

Because it is so obvious that there must be judicial review of APA violations, few courts have commented on the point.[21] This Court, however, has more than

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[20] *See Moss v. CAB*, 430 F.2d 891 (D.C. Cir. 1970).

[21] The questions inherent in determining whether the FCC violated the APA include: whether the FCC's acts did amount to "agency action" within the meaning of the APA and whether notice and comment were necessary when the FCC first set out on the path which led to the Family Viewing Policy. Because those questions are essentially legal, they are not subject to the primary jurisdiction doctrine; moreover they are clearly within the conventional expertise of judges, rather than administrative agencies. *E.g., Nader v. Allegheny Airlines, Inc., supra.* Thus, there is no practical reason for reference to the FCC.

once recognized the validity of that position: "Of course, the *court* must determine whether the agency complied with the procedures mandated by the relevant statutes." *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 549 n.21 (1978) (Emphasis added).[22] In *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 417 (1971), cited by this Court in *Vermont Yankee*, a district court reviewed the Secretary of Transportation's procedures for their compliance with, *inter alia*, 5 U.S.C. §§ 553(a)(2) and 554(a). Although the Secretary had not made formal findings, "the absence of formal findings [did] not necessarily require that the case be remanded to the Secretary." *Id.* Since primary jurisdiction can be raised at any time, even on the Court's own motion, the clear inference is that reference to the agency was not required.

This Court has recognized that review of agency action should be provided expeditiously, before unnecessary injury to substantial rights occurs. *See Abbott Laboratories v. Gardner*, 387 U.S. 136, 153 (1967). Consistent with that recognition, no other court has ever required an agency to determine if it has complied with the notice and comment requirements of the APA. To the contrary, several courts, on facts analogous to those in this case, specifically have held that district courts have jurisdiction to hear APA or APA-like challenges. *Humana of South Carolina, Inc. v. Califano*, 590 F.2d 1070, 1980-81 (D.C. Cir. 1978) (district court had jurisdiction over claim that proceeding not consistent with 5 U.S.C. § 553); *Independent Broker-Dealers'*

[22] District courts commonly review agency action for compliance with the APA. *E.g., Community Nutrition Inst. v. Butz*, 420 F.Supp. 751 (D.D.C. 1976); *Center for Auto Safety v. Tiemann*, 414 F.Supp. 215 (D.D.C. 1976), *remanded on other grounds*, 580 F.2d 689 (D.C. Cir. 1978); *A. E. Staley Mfg. Co. v. United States*, 310 F.Supp. 485 (D.Minn. 1970).

Trade Ass'n v. S.E.C., 442 F.2d 132, 136-37,142-43 (D.C. Cir.), *cert. denied*, 404 U.S. 828 (1971) (district court had jurisdiction over claim that SEC "request" to New York Stock Exchange to change its Constitution violated notice and hearing requirements of 15 U.S.C. § 78s(b)).

The holding below postpones review of agency action for compliance with the APA. It does so in the face of clear case and statutory dictates to the contrary. Since the basic issues are legal ones, reference to the FCC provides no countervailing gains.

CONCLUSION

For each of the foregoing reasons, Petitioners pray this Court to grant this Petition for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this matter.

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Respectfully submitted,

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